

13 Mar 03

STATE OF MICHIGAN  
IN THE SUPREME COURT

In the Matter of C.A.W., a Minor

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FAMILY INDEPENDENCE AGENCY,

Supreme Court No. 122790

Petitioner-Appellant,

Court of Appeals No. 235731

v.

Macomb Circuit Court No. 92-36958-NA

LARRY HEIER,

Appellee,

and

DEBORAH ANN WEBER AND  
ROBERT RIVARD,

Respondents.

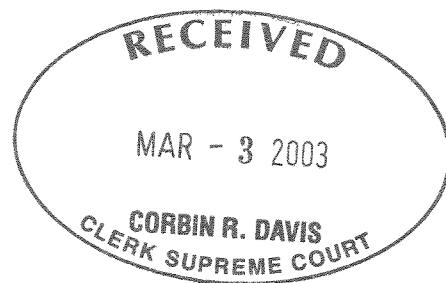
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**BRIEF OF AMICUS CURIAE CHILDREN'S LAW SECTION**

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## **STATEMENT OF INTEREST OF AMICUS CURIAE**

The Children's Law Section of the State Bar of Michigan is a recognized section of the State Bar of Michigan with approximately five hundred members. It is made up of attorneys and judges who handle abuse/neglect and delinquency cases in the family courts across Michigan. The members represent children, parents and the Family Independence Agency (FIA) in child protective proceedings and have extensive knowledge and experience in the day-to-day application of the relevant law and how it affects children and families. With this specialized expertise the Section is particularly well suited to offer this Court assistance in this case. The Court requested such assistance in December 2002.

## **QUESTION PRESENTED**

Whether the Juvenile Code authorizes a court to make paternity determinations in a case under the Code involving a child born to or conceived by a married woman when such determinations would be conducive to the welfare of the child.

Appellant answers “No.”

Appellee answers “Yes.”

The Court of Appeals answered “Yes.”

The Children’s Law Section answers “Yes.”

## **STATEMENT OF FACTS**

The Amicus, Children's Law Section, accepts the Statements of Proceedings and Facts set out by the Appellant and the Appellee. To highlight the ramifications of the rulings proposed by all parties, however, amicus provides the following vignette, which will be referred to at various points in the brief.

## VIGNETTE

While Joe Brown is in jail, his wife Tanya meets a man named Tom Walters. Tanya and Tom start to spend time together. Tanya gets pregnant by Tom. Tom suggests that she divorce Joe. Tom promises to take care of her, their baby, and her three-year-old daughter (by Joe), Tracey. Tanya does not directly respond to his proposal, but the three of them, Tom, Tanya, and Tracey live together in Tom's apartment. When Tom accompanies Tanya to the pre-natal visits, his mother baby-sits Tracey.

Tom is not listed on the birth certificate when his biological son Michael is born. He cannot file a paternity suit. Still, he does everything that a father can and should do to care for his child. He provides for Michael's material needs from his earnings. He is an active caretaker, changing diapers late at night, taking his son to medical appointments, and helping him as he starts to walk and talk.

When Michael is fifteen months old, Tanya gets a letter from Joe. He's getting out soon. He has changed his ways and wants to start making things up to her. He knows about the baby, and he understands. He wants her to get ready to start their life together again.

Tanya does move back in with Joe. Tom still manages to spend time with the baby when Joe is at work. One day, during a visit about two months after Joe's letter, Tom notices bruises on the baby's back. He asks Tanya what happened. She is evasive. Tom calls Protective Services. An investigation reveals that Joe has beaten Michael on several occasions. Neighbors have heard him shouting the word "bastard" while this goes on. The neighbors report that Tanya has been present when the beatings take place. A petition is filed under the Juvenile Code alleging that Joe abused Michael and that Tanya failed to protect him.





## **STATEMENT OF POSITION**

The authority to conclusively establish paternity to a child is essential to a court's obligation under the Juvenile Code to ensure the child is protected from harm and provided with appropriate care. When proceeding under the Juvenile Code, a court may determine paternity if doing so would be conducive to the child's welfare and the best interests of the public, even if the result is the disestablishment of the paternity of the presumed legal father, the mother's husband. In determining whether such action would be conducive to the child's welfare, the court should consider:

- the existence of a substantial parent-child relationship between the child and the putative biological father;
- the extent to which the mother's husband has taken the child into his home and/or held the child out as his own;
- whether the mother's husband had access to or sexual relations with the mother at or around the probable time of conception;
- the ability and willingness of any relevant person to provide the child with a safe and appropriate permanent home;
- the impact of any delay likely to be caused by the paternity determination upon the prospects for promptly achieving permanency for the child; and
- any other factor relevant to the child's short and long-term welfare.

## ARGUMENT

### **I. The Legislature has authorized courts to order direct and deep intrusions into otherwise private aspects of family life when necessary to provide the protection and care for children required by the Juvenile Code.**

When acting under the Juvenile Code, the Family Court is charged with ensuring that each child within the court's jurisdiction "receives the care, guidance and control, preferably in his or her own home, conducive to the juvenile's welfare and the best interest of the state." MCL 712A.1(3). This Court has recognized that "[t]he purpose and focus of a neglect or abuse proceeding in the juvenile division of the probate court is the protection of children." *People v. Gates*, 434 Mich. 146, 161 452 N.W.2d 627 (1990). The Legislature has commanded that the Code "shall be liberally construed" so as to achieve the purpose of providing children with appropriate care. MCL 712A.1(3).

Recognizing that the circumstances bringing children within the court's jurisdiction will be numerous and varied, the Legislature has included in the Juvenile Code broad powers enabling the court to intrude into otherwise protected and private family arrangements. For example:

The court "may make orders affecting adults as ...are necessary for the physical, mental or moral well-being" of children within its jurisdiction. MCL 712A.6.

The court may order a parent ...or other person to leave the child's home and not to subsequently return, even if the person so ordered is married to the parent remaining in the home. MCL 712A.13a(4). (Such an order may be issued before adjudication, upon a showing of probable cause to believe the person has abused the child and the further showing that the person presents a substantial risk of harm to the child.)

The court may order that the child be removed from the home and placed in relative placement or foster care. See, MCL 712A.13a(1)d and (8).

At disposition, the court may order compliance with a case service plan, which may include restrictions on contact between the child and any dangerous adult, including a parent. MCL 712A.18f(4).

Not only are the court's powers broad, but they are public. Subject to certain exceptions, proceedings under the Juvenile Code and the records of them are open to the public. MCR 5.925(A)(1) and (D)(1). Moreover, with the exception of the lawyer-client privilege, privileges that would prevent the disclosure of private information in all other judicial proceedings are not operative in child protective proceedings. See, MCL 722.631; *In re Brock*, 442 Mich. 101, 499 N.W.2d 752 (1993). This Court has recognized that this vast abrogation of privilege is a telling indication of the Legislature's vision for the way courts would meet the needs of abused or neglected children. In determining the scope of the abrogation effected by MCL 722.631, the *Brock* Court rejected two interpretations adopted by the Court of Appeals, each of which would have limited the abrogation and preserved the privileges to some degree. The first narrowing interpretation would have limited the abrogation's operation to only those cases in which a report of abuse or neglect was made by a person required by statute to make such reports. The second narrowing interpretation would have confined the abrogation to only that evidence which "results from a report" made pursuant to the Child Protection Law. Thus, if the Court had ordered treatment, the information pertaining to that treatment would not be privileged, but pre-existing medical, psychological or other information would be. The Court rejected both of these narrowing interpretations, in part because "the purpose of a child protective proceeding is to protect the welfare of the child." *Brock*, 442 Mich. at 119. The urgency of this purpose necessitates the information and outweighs the parent's interests in keeping the information

private. Thus, evidence of psychological counseling a parent underwent years before the alleged abuse or neglect, perhaps even years before the child's birth, is not protected from disclosure.

This Court has also recognized that the Juvenile Code confers upon a court the authority to issue orders affecting children in a manner that contradicts orders issued by other courts, where such contradictory orders are necessary for the protection of children. *Krajewski v. Krajewski*, 420 Mich. 729, 362 N.W.2d 230 (1985). Thus, a circuit court may hold a lengthy hearing as to custody as part of a divorce proceeding. The court may then order that the mother, for example, be awarded legal and physical custody. If, subsequent to that order, a petition is filed under the Juvenile Code alleging abuse or neglect in the mother's home, the court hearing that petition may make orders that derogate the mother's custody and perhaps even result in placement with the father. In reaching the conclusion that such power inheres in the responsibility to protect children from abuse and neglect, this Court stated its "conviction that the children intended to be protected by the Juvenile Code can best be served by a procedure which, having provided for appropriate notice and opportunity for the prior court to exercise its responsibility under its jurisdiction to further the child's best interests, nonetheless gives **unrestricted freedom** to the juvenile court to carry out its mandate." *Id.*, at 734-35. (Emphasis added). While proceedings under the Juvenile Code now take place in the Family Division of the Circuit Court<sup>1</sup>, see, MCL 600.101 et seq., the principle of *Krajewski* carries forward and is embodied in MCR 3.205.

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<sup>1</sup> The fairly recent change to have Juvenile Code proceedings heard by the Family Court rather than the Probate Court has increased the likelihood that the distinct jurisprudence developed under the Juvenile Code would become blurred by the too-ready transplantation of general family law doctrines. This case is one example of this risk.

**II. Courts have recognized that the Paternity Act, and especially its restrictive rules of standing, serve much narrower purposes than those expressed in the Juvenile Code and that the Act's outdated restrictions thwart justice and ill serve children and families.**

Throughout its history, the Paternity Act, presently codified at MCL 722.711 et seq., has expressed “the Legislature’s concern with the support of illegitimate children.” *Girard v. Wagenmaker*, 437 Mich. 231, 240, 470 N.W.2d 372 (1991). Even though the legal and other burdens upon children conceived by people not married to one another have been greatly reduced since the initial enactment of the Paternity Act, the Legislature has continued to “include limitations on the accessibility to” the Act. *Id.* Until this court’s decision in *Serafin v. Serafin*, 401 Mich. 629, 258 N.W.2d 461 (1977), there was a conclusive presumption that a child born to a married woman was the child of her husband. This conclusive presumption was originally defended as serving a number of policies: (1) reducing the number of public charges; (2) preserving the peace and quiet of the marital family; (3) preserving the peace of the community; and (4) preventing parents from bastardizing a child. *Serafin*, 401 Mich. at 634. Asserting that the rule of a conclusive presumption “has outlived the policy reasons initially advanced to support it” and “finding none others persuasive,” the Court converted the presumption to a rebuttable one. *Id.* With respect to the “peace of the general society,” the Court wrote that “the public peace and respect for the law are enhanced” by allowing a court to consider all of the evidence on the question of paternity and make a determination that best fits the facts of the family’s life. *Id.*, at 635.

In response to the *Serafin* ruling, the Legislature amended the Paternity Act to ensure that a mother would be able to seek support for her child from the biological father after her husband

at the time of the child's birth or conception had demonstrated his non-paternity. MCL. 722.711; *Girard*, 437 Mich. at 240. Because of the specific language by which the Legislature accomplished this goal, this Court ruled in *Girard* that a putative biological father has no standing under the Paternity Act to assert his own paternity unless a court has already determined that the woman's husband is not the child's biological father. *Girard*. Thus, a putative biological father is not able to file a suit under the Paternity Act even if the mother's husband was in jail, on continuous active military duty half-way around the world, or impotent for the entire year preceding the child's birth.

The *Girard* Court explained its ruling as "required by the plain language" of the Paternity Act and "the only reasonable construction of the Paternity Act which will give effect to all its parts as a whole." *Girard*, at 243. The Court framed the issue in *Girard* narrowly as the proper interpretation of the definition within that statute of a "child born out of wedlock." The Court did not offer any broader policy justification to support the ruling and itself expressed sympathy for the "moral dilemma" raised by the dissent "between the paternal needs of the biological father and those of the presumptively legitimate child." The majority stated that it "could not agree more" with the dissent's pointed assertion that "[i]t is surely a bit late to talk of preserving the 'sanctity' of the marital family by the time a situation like the one alleged in this case has arisen." *Id.* at 249 (quoting the dissent at 271). However, the Court stated the "answer to the dissent's concerns will have to come from" the Legislature, which has "chosen to protect this 'sanctity'" and "avoid a challenge to a presumed legitimate birth until a prior determination rebuts legitimacy and threatens the child's support by exposing the fact that the presumed father is not the biological father." *Id.* at 250. The Court of Appeals has written of its "dislike" for the

*Girard* rule and stated that it could not “pretend that justice has been served” by the application of the rule to a case before it. *Spielmaker v. Lee*, 205 Mich.App. 51, 59, 517 N.W.2d 558, 561 (1994). Bound by the ruling in *Girard*, the *Spielmaker* majority “invite[d] the Legislature to modify the statute and future litigants to question the validity of the statute.” *Id.*, 205 Mich.App. at 60. The separate opinion in *Spielmaker* bluntly stated that the outdated constraints of the Paternity Act led to “a rotten deal” for the child at the heart of the case. *Id.*, at 62.

**III. The policies served by the limits on standing under the Paternity Act neither require nor warrant limitations on the authority of a court to determine paternity under the Juvenile Code.**

As stated above, a court’s first responsibility under the Juvenile Code is the protection and care of children. This is an extremely difficult task, and “[i]t is in the best interests of all parties for the factfinder to be in possession of all relevant information regarding the welfare of the child.” *Brock*, 442 Mich. at 119. Denying the court the power to inquire into and determine paternity forces the court to (1) forego important information about the child and/or (2) ignore such information. Consider the hypothetical vignette at the outset of this brief. The court, the agency, and all parties are fully aware that the husband is not the biological father. Nevertheless, the position urged by the Family Independence Agency in the instant case would require everyone to pretend otherwise. The problems faced by abused or neglected children are too serious and too challenging for time and energy to be spent perpetuating illusions. The position urged here by amicus, -- recognizing a court’s authority to make paternity determinations in all cases under the Juvenile Code -- would enable the Court to make maximal use of all of the information it is able to uncover regarding the child and his/her family. This use must include the authority to declare the husband not to be the father, see *In the Matter of Montgomery*, 185



Mich.App. 341, 460 N.W.2d 610 (1990), and to then declare the biological father to be the father.

As with the abrogation of privilege, the power under the Juvenile Code to order an adult out of his own home, even his own marital home, reflects a Legislative determination that a family's right to privacy must yield to the need to protect children from harm. When a court has ordered a man out of his marital home, compelled the disclosure of private information possessed by medical and mental-health professionals, and ordered that the man have no contact with the child of his wife, the court is entitled to recognize that the "peace" of the marital home has been disrupted to a degree that, where appropriate, inquiry into the man's actual paternity of the child does not significantly add to the disruption and may well provide a means of protecting the child from further abuse.

The willful blindness that would follow from the position urged by the Family Independence Agency will limit the resources available to the court in some cases. After the court orders a child's removal from his/her home due to abuse or neglect, the Family Independence Agency must, within 30 days, "identify, locate and consult with relatives to determine placement with a fit and appropriate relative who would meet the child's developmental, emotional and physical needs." MCL 722.954a(2). Consider again the hypothetical at the outset of this brief. Given the fact that everyone knows that the child is not the husband's child, it is unlikely that members of the husband's extended family will present themselves to care for a child who is truly no kin to them. Rather than the pull of blood ties, they will feel the rejection of their family implicit in the child's conception. Recognizing Tom as the boy's father would not only make him available as a caregiver for his son, it will establish the

son's legal connection with an entire extended family that does see him as one of their own. In a clearly unintended paradox, the Family Independence Agency's position that the court may not determine paternity leaves a child born within marriage with fewer recognized family resources than a child born to an unmarried woman. If the mother was unmarried, the statutory obligation to explore extended family resources would run on both sides of the family, once paternity was established.

Grafting the Paternity Act's restrictions onto the Juvenile Code would not serve the policies advanced by the now-rebuttable presumption of paternity. By preventing the Court from treating the child's biological father and his family as the child's true father and family, the court is depriving the child of a potential safe and caring home, thereby increasing the likelihood that the child will be placed in foster care as a public charge. By definition, the peace and quiet of the marital family and the community in which the family exists are already severely disturbed by the initiation of Juvenile Code proceedings and, even more so, by the acts, omissions, and circumstances that lead to such proceedings. The court cannot undo the damage a child has suffered by ignoring the reality of the child's conception. If the mother and/or her husband have in fact abused or neglected the child to such a degree that jurisdiction is warranted under the Juvenile Code, then they have, by definition, placed the child at substantial risk of harm and/or in an unfit home. See, MCL 712A.2(b). This actual deprivation and injury is far more serious than the symbolic harm, if any, that would result from a judicial determination that the child is not the offspring of the mother's husband. Finally, as noted in the discussion of *Serafin*, above, respect for the law is not enhanced by conscious ignorance. Thus, none of the policy justifications

offered for the Paternity Act's limitations on challenges to a married man's paternity obtain when a court is faced with proceedings under the Juvenile Code.

Under the Paternity Act, the protection of marital integrity lasts until the question of the husband's paternity is raised by one of the parties to the marriage, in the course of a dispute over custody and/or support. The failure of the parties to the marriage to properly provide for the child, thereby necessitating proceedings under the Juvenile Code, similarly serves as a trigger for judicial inquiry into true paternity. Although the proceedings in such a case may not be initiated by either parent, the court is nevertheless responding to a similar fracture within the family. In fact, in many instances, the circumstances leading to a petition under the Juvenile Code are far more dangerous to a child's well-being than are those raised within the dissolution proceedings in which paternity may be disestablished under the Paternity Act.

It is true that the Legislature has not explicitly authorized a court proceeding under the Juvenile Code to make any determinations concerning paternity, either to establish or disestablish it. The court's power to make such determinations when a child is born to an unmarried woman is uncontroverted. This reflects the recognition that the Code empowers the court to identify people who, by virtue of their relationship to the child, may be able to provide the care the child needs.

**IV. The Family Court should not inquire into paternity when doing so would not be conducive to the child's welfare.**

The justification set out above for authorizing courts to make paternity determinations for the children of married women under the Juvenile Code suggests its own limitations as to when such determinations should be made. Because the authority to make paternity determinations

under the Juvenile Code arises from the command to provide children with care “conducive to [their] welfare,” the Court need not undertake such determinations if doing so would not be conducive to the child’s welfare.

This analysis is consistent with the modern trend across the nation. The Uniform Parentage Act allows for putative fathers to rebut the paternity of a presumed legal father, but requires that such claims be brought within two years of the child’s birth unless the presumed father neither cohabited with nor engaged in sexual relations with the mother during the probable time of conception and the presumed father never openly treated the child as his own. Uniform Parentage Act (2000), Section 607. The time limit is designed to make sure that biological fathers do not wait too long, allowing their children to grow up without them and only later inserting themselves into their children’s life.<sup>2</sup> In some states, the court must determine that the inquiry into paternity is in the best interests of the child before going forward with the litigation. See, e.g., *Ban v. Quigley*, 812 P.2d 1014 (Ariz. App. 1990), review dismissed, 169 Ariz. 477, 820 P.2d 643 (1991); *McDaniels v. Carlson*, 738 P.2d 254 (Wash. 1987). In Massachusetts, a putative father seeking to overcome the presumption of a husband’s paternity must first show by clear and convincing evidence, at a preliminary hearing, that a substantial relationship exists between himself and the child. *C.C. v. A.B.*, 550 N.E.2d 365 (Mass. 1990). These citations demonstrate both the feasibility of making individualized determinations as to whether a court

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<sup>2</sup> Referring to cases where the marital family was not intact at the time of conception, the Comment to Section 607 states “[i]t is inappropriate to assume a presumption known by all those concerned to be untrue.” See also, *C.C. v. A.B.*, 550 N.E.2d 365, 371 (Mass. 1990) (“Modern trends in the law, combined with changes in social attitudes, have brought into question the continuing validity of archaic rules which obfuscate the truth-seeking principles our system of jurisprudence strives to achieve.”) These quotations show the continued retreat from the willful blindness encouraged by the traditional presumption.

should inquire into paternity and the utility of the factors proposed in this brief for determining whether paternity findings will be conducive to a child's welfare. If the presumed legal father has treated the child as his own, then it will likely not be conducive to the child's welfare to inquire into paternity. If the putative biological father has had little contact with the child, the court may decide that it will not serve the child's interest to establish him as the father or even to raise the issue.

In the instant case, the timing of the trial court's action made it contrary to rather than conducive to the child's welfare. Allowing the putative father to intervene after termination of the mother and legal father's rights adds further delay and stalls permanency for a child who has already been waiting a considerable period of time. Moreover, the record does not establish the sort of relationship between the child and the putative biological father that would warrant any additional delay.

The discussion in this section highlights an important distinction between paternity determinations made under the Juvenile Code and those made under the other statutes. Proceedings outside the Juvenile Code are initiated by adults (mother and presumed legal father in the first instance, putative father and/or state agency after that). Determinations made pursuant to the Juvenile Code are driven by the child's interests. Thus, the court need not wait for a petition from the putative biological father. If the court is presented with evidence that the legal father was incarcerated at the time of conception, for example, as in the hypothetical at the outset of this brief, the Court should direct the Family Independence Agency to inquire as to the existence of a biological father. That father may well be interested in the child's life and may even have played an active caretaker role, as in the hypothetical, but may yet be unaware that he

can participate in the court proceedings. Imagine that Tom consulted with a lawyer immediately after his son's birth and asked what he could do to assert his rights. The lawyer, per *Girard*, would have to tell Tom that he has no legal rights. There is no reason to think that, just because Tom knows that an abuse/neglect petition has been filed concerning his son, Tom would conclude that he now has rights when he did not before. Under the position urged in this brief, Tom would not have rights. What Tom would have is a relationship with his son that may serve his son's interests and thus the court's interest in providing the child with appropriate care. In the course of doing so, Tom's relationship may become recognized under the law, if the Juvenile Code is interpreted as urged herein.

**V. The authority under the Juvenile Code to make paternity determinations of the children of married women is consistent with the equitable parent doctrine.**

Pursuant to the equitable parent doctrine, a court may declare that a husband who is not the biological father of a child may nevertheless be treated as if he were the child's biological and legal father, if such a determination is warranted by the circumstances of the man's relationship to the child. *Atkinson v. Atkinson*, 160 Mich.App. 601, 408 N.W.2d 516 (1987). The *Atkinson* court recognized that it was presented with "a novel request" for relief that was not explicitly authorized by the Child Custody Act. Guided by the statute's direction that it be "liberally construed," *id.*, 160 Mich.App. at 609, and cognizant of the fact that "the best interest of the child is the major concern of any custody determination," *id.*, at 611, the *Atkinson* Court directed that the trial court consider the request for custody made by a husband who had been determined by blood testing not to be the child's biological father. Specifically, the court directed that the

circuit court treat the husband as a natural parent. This Court adopted the *Atkinson* rule and rationale in *Van v. Zahorik*, 460 Mich. 320, 597 N.W.2d 15 (1999).

Like the Child Custody Act, the Juvenile Code states that it is to be “liberally construed.” Like the Child Custody Act, the Juvenile Code is primarily concerned with the well-being of the children before it. There are certainly circumstances, such as in the hypothetical at the outset of this brief, when determinations that a child’s mother’s husband is not his legal father and that the man who sired and cared for him to the maximum extent possible is his legal father will be “conducive to the child’s welfare.” Interpreting the Juvenile Code as authorizing such determinations is consistent with the Code’s purpose, spirit and structure.

Properly limited, as set out in Section IV, the authority to make paternity determinations under the Juvenile Code is harmonious with the equitable parent doctrine, in substance and spirit. The rule proposed here, like that adopted in *Atkinson*, ignores formalism and recognizes that from the perspective of the child, fatherhood is neither a biological or legal construct but is instead the lived experience of care. Moreover, the two doctrines can easily coexist. Because the Family Court’s power under the Juvenile Code to determine paternity of a child of a married woman arises from the responsibility to provide children with care “conducive to [their] welfare”, the two inquiries should not clash. If the presumed father has the sort of close parent-child relationship with the child that would qualify him as an equitable parent, it is almost certain that a paternity determination under the Juvenile Code would not be conducive to the child’s welfare.

**VI. Paternity determinations can be carried out in all cases under the Juvenile Code in a manner consistent with the Rules Governing Juvenile Proceedings.**

The current MCR 5.921(D) provides for notice to a putative father once the court has determined that the child does not have a father, as defined in the MCR 5.903(A)(4). MCR 5.903(A)(4) defines a father to include “a man married to the mother at any time from a minor’s conception to the minor’s birth unless the minor is determined to be a child born out of wedlock.” MCR 5.903(A)(1) defines a “child born out of wedlock” as one “determined by judicial notice or otherwise to have been conceived or born during a marriage but who is not the issue of that marriage.” In the instant case, the Court of Appeals saw these rules’ use of the present tense (“is determined”) as a significant deviation from the language of the Paternity Act, which uses the past tense (“has determined”). This led the Court of Appeals to decide that a paternity determination could be made in the instant case. *In re C.A.W.*, 253 Mich App 629 (2002). This interpretation makes sense. The Rule plainly invites a court to make the determination that a child born to a married woman was not sired by her husband and to take appropriate action thereafter. See, MCL 8.3a (“All words and phrases shall be construed and understood according to the common and approved usage of the language.”).

The Family Independence Agency is correct that Court Rules cannot create substantive rights contrary to statute. However, as argued above, the recognition of the court’s power to make determinations concerning paternity is not a recognition of any right on the part of a putative father. Moreover, the ultimate source of the power to make such determinations is the Juvenile Code itself. Only after the court has determined that a husband is not the father can the Court proceed to treat the biological father as a father and, this should only be done after the



court has determined that doing so would be conducive to the child's welfare. MCR 5.921, which directs the court as to how to proceed when a putative father has been tentatively identified, recognizes that the court's decision to involve the putative father is discretionary. This is consistent with the position taken herein that the court should only reach out to a putative father when doing so will assist the court to ensure proper care for the child.

The procedures in MCR 5.921(D)(1) give the trial court the discretion to take initial testimony on the tentative identity and address of the natural father. If the court finds probable cause to believe that an identifiable person is the natural father, then the court is directed to provide notice to that person. After notice to the putative father has been provided, the court can conduct a hearing. If a preponderance of the evidence establishes that the putative father is the natural father of the child he may be allowed 14 days, or more with good cause shown, to establish his legal relationship pursuant to MCR 5.903(A)(4); see MCR 5.921(D)(2)(b). The rules also allow the court to find that the natural father waives all rights to further notice, if he appears but fails to establish paternity within the time set by the court. MCR 5.921(D)(3).

This procedure allows the trial court to make determinations of whether a man is a legal father whenever a putative father is identified. Assuming the court had made a finding that such action was conducive to the child's welfare, this procedure could have been followed in this case. The trial court could have made a determination as to the tentative identity and address of the natural father pursuant to MCR 5.921(D)(1). Because Mr. Heier's identity was probably known, he could have been notified pursuant to MCR 5.920. Then the court could have conducted a hearing pursuant to MCR 5.921(D)(2)(b). On the facts of this case it is unlikely that Mr. Heier would have been able to establish by a preponderance of the evidence that he was the natural

father.<sup>3</sup> Following these procedures would have produced a paternity determination much earlier, and in a fashion that need not have undermined the goal of permanency for the child.

On February 4, 2003 this court, in Administrative Orders 1998-50 and 2001-19, ordered that a new subchapter 3.900 of the Michigan Court Rules be adopted and that subchapter 5.900 be deleted, to be effective May 1, 2003. These rules are to govern practice and procedure in the Family Division of the Circuit Court in all cases filed under the Juvenile Code. MCR 3.901(A)(1) (effective 5/1/03). These amended rules include a number of changes which are directly relevant to this case. This Court has deleted the definition of “child born out of wedlock” contained in current MCR 5.903(A)(1) and changed the definition of “father” to include, in pertinent parts:

“A man married to the mother at any time from a minor’s conception to the minor’s birth, unless a court has determined, after notice and a hearing, that the minor was conceived or born during the marriage, but is not the issue of the marriage.”, and

“A man judicially determined to have parental rights” MCR 3.903(A)(7).

Thus, the language relied upon by the Court of Appeals in the instant case, which came from the definition of “child born out of wedlock” will no longer be part of the Court Rules. Moreover, the new Rule adopts the past tense (“has determined”) that was critical to the result in *Girard*. This does not mean that the result in the instant case must be or should be to import *Girard*’s limitations into the Juvenile Code. For the reasons stated throughout this brief, the Juvenile Code requires that courts have the power to establish the true paternity of any child

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<sup>3</sup> Most appropriately, the trial court should have ordered that a DNA identification profiling test be conducted, just as in proceedings pursuant to the Paternity Act. See MCL 722.716. A DNA test was ordered in the instant case but no results were made available.

before them. If the Court so holds, the Court Rules would need to be revised to the extent that they are inconsistent with such a ruling. Because this case turns on the proper interpretation of a statute, the prospective change in the rules should have no bearing. The language in the Amended Rules including “[a] man judicially determined to have parental rights” within the definition of “father” would accommodate putative biological fathers. Thus, the Amended Rules are inconsistent with the position urged here only if they are read to require the Court to prevent the court from making paternity determinations regarding children born to or conceived by married women. Such a reading of the Rules, however, is a secondary concern, as this case should be decided by reference to the Juvenile Code itself.

## CONCLUSION

The full and efficient achievement of the legislative intent that abused and neglected children be provided with appropriate care and protection requires that this Court rule that the Juvenile Code authorizes the Family Court to make paternity determinations in all cases under the Code, including cases involving children born to or conceived by a married woman, where such determinations are conducive to the child's welfare.

Respectfully submitted,

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